Gobinath a/l Sinnaya v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05–14–01 OF 2022, W-05–15–01 OF 2022, W-05–16–01 OF 2022 AND W-05–17–01 OF 2022
KAMALUDIN MD SAID, NORDIN HASSAN AND HASHIM HAMZAH JJCA
2 NOVEMBER 2022

Criminal Procedure — Bail — Whether decision to refuse bail was not appealable — Whether High Court's refusal to grant accused bail pending trial was not 'decision' under s 3 of the Courts of Judicature Act 1964 ('the CJA') that was appealable under s 50 of CJA as it was not a ruling that finally disposed of the rights of the parties — Whether rights of parties were only finally disposed of at the end of trial

The appellants herein were charged under s 130V and Chapter VIB of the Penal Code with the offence of being members of an organised criminal group. Since the offence constituted a security offence under the Security Offences (Special Measures) Act 2012 ('the SOSMA'), the appellants' applications to be released on bail pending trial were denied by the High Court on the ground that they did not satisfy the requirements for grant of bail under s 13 of SOSMA. At the outset of the hearing of the instant appeals against that decision, the respondent raised the preliminary objection that the refusal to grant bail was not an appealable 'decision', as defined under s 3 of the Courts of Judicature Act 1964 ('the CJA'), since it did not finally dispose of the rights of the parties.

Held, unanimously allowing the preliminary objection:

(1) The High Court's dismissal of the appellants' applications for bail was not a decision that finally disposed of the appellants' rights. It was not a 'decision' within the meaning of s 3 of the CJA and as such was not appealable under s 50(2) of the CJA. The Court of Appeal was not seized of jurisdiction to hear the appellants' appeals (see para 22).

(2) The right to appeal to the Court of Appeal against any decision of the High Court was given and governed by s 50(1) and (2) of the CJA. Following an amendment to s 3 of the CJA which took effect from 31 July 1998, the word 'decision' therein was defined to exclude any ruling made in the course of a trial or hearing of any cause or matter which did not finally dispose of the rights of the parties. The rights of parties were finally disposed of at the end of a trial. In the present appeals, the trial against the appellants had not yet started, hence the decision to

deny them bail certainly did not finally dispose of their rights which could only happen at the end of the trial (see paras 7–11, 14 & 17).

(3) There was no finality in a bail application as a fresh application could be made if new circumstances or developments arose (see para 20).

[Bahasa Malaysia summary

Perayu-perayu di sini didakwa di bawah s 130V dan Bab VIB Kanun Keseksaan atas kesalahan menjadi ahli kumpulan jenayah terancang. Memandangkan kesalahan tersebut merupakan kesalahan keselamatan di bawah Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('AKK'), permohonan perayu untuk dibebaskan dengan ikat jamin sementara menunggu perbicaraan telah ditolak oleh Mahkamah Tinggi atas alasan mereka tidak memenuhi syarat untuk pemberian jaminan di bawah s 13 AKK. Pada permulaan pendengaran rayuan semasa terhadap keputusan tersebut, responden membangkitkan bantahan awal bahawa keengganan untuk memberikan jaminan bukanlah 'keputusan' yang boleh dirayu, seperti yang ditakrifkan di bawah s 3 Akta Mahkamah Kehakiman 1964 ('AMK'), kerana ia tidak melupuskan hak pihak-pihak secara muktamad.

Diputuskan, sebulat suara membenarkan bantahan awal:

(1) Penolakan Mahkamah Tinggi terhadap permohonan ikat jamin perayu bukanlah keputusan yang melupuskan hak perayu secara muktamad. Ia bukan 'keputusan' dalam pengertian s 3 AMK dan oleh itu tidak boleh dirayu di bawah s 50(2) AMK. Mahkamah Rayuan tidak diambil alih bidang kuasa untuk mendengar rayuan perayu (lihat perenggan 22).

(2) Hak untuk merayu kepada Mahkamah Rayuan terhadap sebarang keputusan Mahkamah Tinggi telah diberikan dan dikawal oleh s 50(1) dan (2) AMK. Berikutan pindaan kepada s 3 AMK yang berkuatkuasa dari 31 Julai 1998, perkataan 'keputusan' di dalamnya ditakrifkan untuk mengecualikan sebarang ketetapan yang dibuat semasa perbicaraan atau pendengaran apa-apa kausa atau perkara yang akhirnya tidak melupuskan hak pihak-pihak. Hak pihak-pihak dilupuskan pada akhir perbicaraan secara muktamad. Dalam rayuan semasa, perbicaraan terhadap perayu masih belum bermula, justeru keputusan untuk menafikan mereka diikat jamin pastinya tidak melupuskan hak mereka secara muktamad yang hanya boleh berlaku pada akhir perbicaraan (lihat perenggan 7–11, 14 & 17).

(3) Tiada muktamad dalam permohonan ikat jamin kerana permohonan baharu boleh dibuat jika keadaan atau perkembangan baharu timbul (lihat perenggan 20).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321; [1999] 1 CLJ 537, CA (refd)
Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474; [2021] 8 CLJ 331, FC (refd)
PP v Mohamed Shahabuddin Mohamed Ali & Ors [2019] 1 MLJ 520; [2018] 8 CLJ 535, CA (refd)
Regina v Collins [1970] 1 QB 710, CA (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129; [1998] 4 CLJ 575, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50, 50(1), (2)
Penal Code s 130V, Chapter VIB
Security Offences (Special Measures) Act 2012 ss 2, 12, 13, First Schedule

Appeal from: Criminal Application Nos WA-44–246–10 of 2021, WA-44–244–10 of 2021, WA-44–243–10 of 2021, WA-245–10 of 2021 (High Court, Kuala Lumpur)

Lavanyia Raja (with Eu Kah Mun) (Geethan Ram & Co) for the appellants.
Dhiya Syazwani Izyan bin Mohd Akhir (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nordin Hassan JCA (delivering judgment of the court):

[1] The appellants in the present appeals were charged for being members of an organised criminal group which is an offence under s 130V and Chapter VIB of the Penal Code. The offence under Chapter VIB is listed as a security offence under the First Schedule to the Security Offences (Special Measures) Act 2012 ('the SOSMA'). Thus, under s 2 of the SOSMA, the provisions of SOSMA shall apply to all security offences which are to be tried by the High Court as provided under s 12 of the same Act.

[2] Before the trial commenced at Kuala Lumpur High Court, the appellants made an application for them to be released on bail but on 30 December 2021, the learned High Court judge dismissed their application on the ground that the appellants have not satisfied the requirement to be released on bail under s 13 of the SOSMA which states:

> 13(1) Bail shall not be granted to a person who has been charged with a security offence.
>
> (2) Notwithstanding subsection (1) —
>
> (a) a person below the age of eighteen years;
>
> (b) a woman; or

A (c) a sick or an infirm person, charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574], and the Special Measures Against Terrorism in Foreign Countries Act 2015 [770] *may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.* (Emphasis added.)

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[3] Aggrieved by the said decision, the appellants filed four separate appeals before this court which are as follows:

C (a) *Gobinath a/l Sinnaya v Public Prosecutor* — Appeal No W-05–14–01 of 2022;

(b) *Sagadevan a/l Sinnaya v Public Prosecutor* — Appeal No W-05–15–01 of 2022;

D (c) *Sathiaseelan a/l Sinnayav Public Prosecutor* — Appeal No W-05–16–01 of 2022; and

(d) *Mohanraj a/l Sinnaya v Public Prosecutor* — Appeal No W-05–17–01 of 2022.

E PRELIMINARY OBJECTION

[4] At the outset, the respondent, the public prosecutor, filed a notice of preliminary objection on the ground that the decision of the High Court judge F on the issue of bail is not appealable.

[5] Before us, the respondent submitted that the appellants' appeals are incompetent as they do not fall within the definition of 'decision' under s 3 of the Courts of Judicature Act 1964 ('the CJA') and read with s 50 of the same G Act. The law precludes this court from considering a ruling made by the High Court judge which is not a 'decision' within the definition of s 3. The Court of Appeal case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321; [1999] 1 CLJ 537 was heavily relied upon by the respondent to support its contention.

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[6] On the other hand, counsel for the appellant submitted that there were instances where the Court of Appeal and the Federal Court heard an appeal on bail. However, the appellants' counsel admitted that in those cases, the issue of I 'decision' under s 3 of the CJA and the application of s 50(2) of the same Act was not raised by the parties or addressed by the courts.

OUR ANALYSIS AND DECISION ON THE PRELIMINARY OBJECTION

[7] To begin with, as the Court of Appeal is a creation of statute, its jurisdiction derives from the statutory provisions, including the right to appeal to the Court of Appeal. The appeal is incompetent unless the statute provides legislative authority that gives the right to appeal. This principle of law has been explained in a plethora of cases including the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321; [1999] 1 CLJ 537 where NH Chan JCA said this:

> ... As said by Lord Goddard CJ in *R v West Kent Quarter Sessions Appeal Committee* [1951] 2 All ER 728 at p 730:
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> > It is most elementary that no appeal from a court lies to any other court unless there is a statutory provision which gives a right to appeal. The decision of every court is final if it has jurisdiction, unless an appeal is given by statute. See also *Attorney-General v Sillem* [1864] 10 HLC 704 where the House of Lords held that the creation of a right of appeal is an act which requires legislative authority: see by Lord Westbury LC at 719.
>
> *There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision that gives a right to appeal. The creation of a right of appeal is an act that requires legislative authority. The right to appeal from one court to another must be conferred by some statute, otherwise, the decision of every court of law is final.* (Emphasis added.)

Jurisdiction for an appeal from the High Court to the Court of Appeal

[8] Reverting to the present issue at hand, the relevant statutory provisions concerning an appeal from the High Court to the Court of Appeal is s 50, sub-s (1) and (2) of the CJA which reads as follows:

> 50 (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, *the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court* —
>
> (a) in the exercise of its original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
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> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, *against any decision of the High Court* in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision. (Emphasis added.)

[9] The word 'decision' has been defined under s 3 of the CJA as follows:

> 'decision' means judgment, sentence, or order, *but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties*; (Emphasis added.)

[10] The definition of 'decision' under s 3 is plain and unambiguous that it excludes any ruling which does not finally dispose of the rights of parties. This as opposed to the earlier definition of 'decision' before the amendment by amendment Act A1031 of 1998 that came into force on 31 July 1998 which is as follows:

> 'decision' means any judgment, sentence, or order.

[11] Hence, after the said amendment, a decision that is appealable under s 50 of CJA is only those that have finally disposed of the rights of parties, not any interlocutory judgment or order where the final rights of parties are yet to be disposed of although the judgment, ruling or order is conclusive or final to the subordinate matter. This has been succinctly explained in the *Dato' Seri Anwar Ibrahim*'s case at pp 320–321 (MLJ); p 549 (CLJ) in the following manner:

> This new definition of 'decision', as in the amendment, *does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory'* by *Halsbury's Laws of England* (4th Edn) Vol 26, para 506, at p 240, which reads:
>
> > 506. *Interlocutory judgments and orders*. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.
> >
> > *An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.*
>
> Shortly stated, *what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s 3 of the Courts of Judicature Act, and therefore is not appealable*. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals. (Emphasis added.)

[12] In the same case, NH Chan JCA further said this:

> The real distinction is between, (for want of a better word) what is called, final judgments and orders and interlocutory judgments and orders. In general, *a*

judgment or order which determines the principal matter in question is termed 'final': see *Halsbury's Laws of England*, supra, para 505, p 238. The use of the term 'final' is tautological as all judgments and orders are final. The term ('final') is used to distinguish between judgments and orders and 'interlocutory' judgments and orders. The difference is that judgments and orders which are not termed 'interlocutory' judgments and orders are appealable under the new meaning of the word 'decision' as defined in s 3 by the 1998 amendment. *In other words, judgments and orders which determine the principal matter in question are termed 'final' judgments and orders, and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed 'interlocutory' judgments and orders) are now no longer appealable.* (Emphasis added.)

[13] The principle of law on this issue is no different in the United Kingdom. The Court of Appeal *Regina v Collins* [1970] 1 QB 710 held that:

... the court had no jurisdiction to bear the application that the Court of Appeal (Criminal Division), having some powers as its predecessor, the Court of Criminal Appeal, which was created by the Criminal Appeal Act, 1907, had no statutory jurisdiction to hear an interlocutory appeal; *that since the court was created by statue, it had no powers beyond those conferred on it by Parliament. Accordingly, there was no inherent jurisdiction to hear interlocutory appeals.*

Reg v Grantham [1969] 2 QB 574; [1969] 2 WLR 1083; [1969] 2 All ER 545, Ct — MAC, and *Reg v Jefferies* [1969] 1 QB 120; [1968] 3 WLR 830; [1968] 3 All ER 238, CA applied. (Emphasis added.)

When do the rights of parties are finally disposed of?

[14] The pertinent question here is when the rights of parties are finally disposed of. This has been answered in many decided cases and has become a settled law. The rights of parties are finally disposed of at the end of a trial. In *Dato' Seri Anwar Ibrahim*'s case the issue was explained in the following words:

A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. *It is the outcome of the trial that would have the effect of finally disposing of his rights.* (Emphasis added.)

[15] The same stand was taken by this court in the case of *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129; [1998] 4 CLJ 575 where Lamin Mohd Yunus PCA (as he then was) states:

Whether it is a judgment, decision, or order pronounced by a court, there must be an element of finality before there can be an appeal.

Now we may recall s 50(2) of the Courts of Judicature Act 1964, it employs the word 'decision' which is defined in s 3. Early this year by Amendment Act A1031 of 1998, that definition was amended to read:

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> 'decision' means judgment, sentence, or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

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> *So, for s 50(2), this court has first to ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not and it would only happen after a decision had been made at the close of the defence.* (Emphasis added.)

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[16] Further, this court in *Public Prosecutor v Mohamed Shahabuddin Mohamed Ali & Ors* [2019] 1 MLJ 520; [2018] 8 CLJ 535 explained the issue in the following words:

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> [25] Our courts have applied a 'salutary general rule' in criminal and civil proceedings for many years that appeals are not entertained piecemeal. *Decision of the High Courts has generally been held to be appealable only if they have three attributes. They must be final in effect, definitive of the rights of the parties, effectively dispose of a substantial part of the relief claimed in the main proceedings and it does not leave anything to be done in the trial with respect of the merits of the case. In other words, the rule, in general, permits an appeal to be taken only from a final decision which disposes of all the issues presented in the trial. Quite obviously, all the issues in the case at bench were not disposed of if the respondents have yet to testify in their defence.* (Emphasis added.)

E

Whether the ruling or decision by the High Court judge in refusing bail to the appellants is appealable

F

[17] In the present case, the appellants sought from the High Court that they are given bail pending disposal of the trial for charges against them of being members of a criminal group under s 130V of the Penal Code. In this regard, the decision by the High Court in dismissing the application for bail on 30 December 2021, certainly does not finally dispose of the appellants' rights which could only happen at the end of the trial when the court decides whether the appellants are guilty or otherwise. Here the trial has not yet started. The hearing date for the trial is fixed on 6–9 February 2023 and 20–23 February 2023. Therefore, the decision in refusing bail is not within the meaning of 'decision' under s 3 of the CJA, and as such not appealable under s 50 of the same Act.

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[18] The question of whether the decision on bail is appealable had also been decided by this court in *Dato' Seri Anwar Ibrahim*'s case where Lamin Mohd Yunus PCA said this:

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> *The issue before us is whether the matter of bail is appealable to the Court of Appeal.* The Courts of Judicature Act 1964 spells out the areas of jurisdiction for the Court of Appeal both criminal and civil. Its criminal jurisdiction is found within the terms of s 50 of the Act. Section 50 employs the word 'decision' with its definition provided

for in s 3. As it has been suggested the definition of the word 'decision' would exclude any ruling on any matter extraneous to the issues to be determined in the main case. This, as I understand it, would mean any decision of the High Court on any matter would be appealable to the Court of Appeal. That cannot be the intention of Parliament. *The matter of bail may very well be extraneous to the issues to be determined in the main case. But that is not the issue. What are appealable, as is intended by the current definition of the word 'decision' are those decisions of the High Court that have the effect of finally disposing of the rights of parties. To get bail is not as of right*. Bail under s 388 of the Criminal Procedure Code is granted at the complete discretion of the court.

The very nature of bail possesses no element of finality. It is something of a respite. It is a mechanism for temporary relief from confinement. Once given it is capable of being withdrawn. Upon refusal, it can be reapplied. With the greatest of respect, I am unable to accept the interpretation as submitted by the learned counsel for the appellant. *I am therefore quite clear in my own mind that an appeal on the matter of bail is incompetent to be laid before this court and therefore is rightly dismissed. With that, the proceedings of this morning should end.* (Emphasis added.)

[19] In the same case, NH Chan JCA opined as follows:

A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. *It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court Appeal.* (Emphasis added.)

[20] Moreover, there is no finality in an application for bail as a fresh application can be made if new development arises. As such, the decision on bail, as in the present case, does not finally dispose of the rights of the appellants. This issue was addressed in *Dato' Seri Anwar Ibrahim*'s case in the following paragraphs:

In *Babu Singh v State* AIR [1978] SC 527, the Supreme Court of India has held that even if a previous application for bail was rejected by the Supreme Court, *a fresh application for bail can be moved to the same court if new circumstances or developments arise for the applicants to apply for bail again.* This is what the Indian Supreme Court (VR Krishna Iyer and DA Desai, JJ) said, at 528, by VR Krishna Iyer J:

2. Briefly we will state the facts pertinent to the present petition and prayer and proceed thereafter to ratiocinate on the relevant criteria in considering the interlocutory relief of bail. Right at the beginning we must mention that, at an earlier stage, their application for bail was rejected by this Court on September 7, 1977. *But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations*. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at

a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not overturning an earlier negation. In this view, we entertain the application and evaluate the merits pro and cons.

In *Babu Singh* the *Indian Supreme Court has clearly laid down the principle that an order refusing bail does not bar another application for bail on a later occasion.*

...

Babu Singh is not a case of an appeal from the High Court to the Supreme Court against a refusal of bail by the High Court but *the judgment is useful for the purpose of the present case as it goes to show that the grant or refusal of bail is actually a ruling made in the course of a trial or hearing of any cause or matter which does not finally determine the rights of the parties. As such, the grant or refusal of bail is not a 'decision' within the meaning of that word in s 3 of the Courts of Judicature Act as it applies today because such a decision (ruling) does not have the effect of finally determining the rights of the parties.* (Emphasis added.)

[21] As regards the submission by the counsel for the appellants that there were cases at the Court of Appeal and Federal Court on the issue of bail, we find that those cases do not address the application of s 50 of the CJA and in particular the meaning of decision under s 3 of the same Act. Those decisions are per incuriam as the relevant statutory provisions governing the issue at hand were not addressed or referred to (see *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474; [2021] 8 CLJ 331 (FC)).

CONCLUSION

[22] Based on the aforesaid reasons, it is our unanimous decision that the decision by the High Court Kuala Lumpur in dismissing the appellants' bail application does not finally dispose of the appellants' rights. It is not a decision within the meaning of s 3 of the CJA and as such not appealable under s 50(2) of the same Act. Consequently, this court does not seize the jurisdiction to hear the appellants' appeals. Therefore, the respondent's preliminary objection is allowed.

Preliminary objection allowed.

Reported by Ashok Kumar